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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HOLLINGSWORTH OIL COMPANY, GLENN HOLLINGSWORTH, and RONNIE HOLLINGSWORTH, JR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court properly found that petitioners were denied due process because of the government's destruction of constitutionally material evidence necessary for petitioners' defense.
2. Whether the district court properly found that petitioners suffered actual prejudice resulting from the government's negligent destruction of exculpatory documents, which prejudice, coupled with preindictment delay, warranted dismissal of the indictment.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Hollingsworth Oil Company, Glenn Hollingsworth, and Ronnie Hollingsworth, Jr., pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 30, 1985.

OPINIONS BELOW

The United States District Court for the Middle District of Tennessee entered a memorandum and order on February 8, 1985, granting petitioners' motion to dismiss the indictment.

The United States Court of Appeals for the Sixth Circuit entered an order on December 30, 1985, reversing the district court's dismissal of the indictment, and on March 4, 1986, denied petitioners' petition for rehearing en banc.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed is the order of the United States Court of Appeals for the Sixth Circuit dated December 30, 1985. That order reversed the dismissal of the indictment against petitioners by the United States District Court for the Middle District of Tennessee.

A petition for rehearing *en banc* to the Sixth Circuit Court of Appeals was denied on March 4, 1986.

This Court has jurisdiction to review the judgment of the Sixth Circuit Court of Appeals by virtue of 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES & REGULATIONS

U.S. Constitution, amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Crim. Pro. 16—SEE APPENDIX FOR TEXT

18 U.S.C. §3500—SEE APPENDIX FOR TEXT

10 C.F.R. Part 211—SEE APPENDIX FOR TEXT

STATEMENT OF THE CASE

This case involves the retrospective interpretation of a complex set of federal and state regulations which governed

the petroleum industry, as applied to the conduct of petitioners during 1978-79. The federal petroleum allocation regulations and state counterparts ("regulations"), which were confusing, inconsistent and arbitrarily applied, provided controls governing the distribution of petroleum products by "suppliers," which category included petitioner Hollingsworth Oil Company. 10 C.F.R. Part 211. Hollingsworth Oil, a small, family-owned and family-operated business, did not have the benefit of either in-house counsel or the advice of counsel knowledgeable in energy and oil and gas law. Thus, it was forced to rely on the advice of state and federal administrative personnel.

The regulations, designed to ensure equitable distribution of petroleum supplies, provided that certain aspects of petroleum distribution would be under the control of the states. State enactments, known as "set-aside" programs, provided bulk product to suppliers upon approval of a written application for supply by the state energy agency. In Tennessee, the set-aside program was administered by the Tennessee Energy Administration (TEA). The federal regulations specified that an applicant could obtain product upon a showing of "hardship" or "emergency," but did not define the terms, nor were the terms defined by Tennessee law. The grant of set-aside fuel to any individual company was left totally to the discretion of the TEA and its caseworkers. Hollingsworth Oil submitted set-aside applications to the TEA from 1978 through late 1979 and received set-aside fuel during this period.

In response to confusion regarding administration of the set-aside program nationally, the General Accounting Office (GAO) instituted a national audit of the program in September, 1979. Petitioner Glenn Hollingsworth was interviewed as a part of the evaluation.

An investigation of petitioners commenced, apparently because of information voluntarily provided to the GAO by Glenn Hollingsworth. Seventeen months after the GAO au-

dit, the Department of Energy (DOE) issued a civil subpoena to Hollingsworth Oil for *all* of its primary documents, not just those concerning the set-aside program.

Although Hollingsworth Oil, a small company, sought to comply with the subpoena, DOE sought to enforce the subpoena in the district court. Three months after the government's enforcement action was filed, the district court heard the case. Nineteen months later, the district court entered an opinion granting enforcement of a portion of the original subpoena.

A case against petitioners was forwarded from the DOE to the Department of Justice and ultimately to the United States Attorney for prosecution in June, 1984. An indictment was returned in the case on September 20, 1984. The basis for jurisdiction in the federal district court was 18 U.S.C. § 3231. Immediately after the arraignment on October 22, 1984, petitioners filed letter requests for production of documents, and, receiving no response, filed subpoenas duces tecum on the government. In addition, there was a standing discovery order by the United States District Court for the Middle District of Tennessee requiring disclosure of all documents to petitioners. After sending petitioners illegible copies of portions of some of the requested and ordered documents, the United States Attorney admitted on January 11, 1985, that the original records of the Tennessee set-aside program had been destroyed, pursuant to DOE authorization contained in its memorandum to state energy agencies dated June 11, 1981.

Petitioners contended that under the facts of record, establishment of a defense is impossible without TEA's original records, which contained: (1) the originals of petitioners' set-aside requests with notations thereon; (2) notes and recommendations of the individuals who processed the set-aside requests; and (3) records of interoffice communications and telephone calls. Petitioners moved to dismiss the indictment on five separate grounds, including the fail-

ure by the government to preserve and produce material, exculpatory evidence, and preindictment delay. On February 8, 1985, the United States District Court for the Middle District of Tennessee granted petitioners' motion to dismiss the indictment, finding that during the government's unreasonable preindictment delay, it had allowed the destruction of constitutionally material evidence while a criminal investigation was in progress, thus denying petitioners due process of law.

The government appealed, and on November 14, 1985, the case was argued before the United States Court of Appeals for the Sixth Circuit. On December 30, 1985, the Sixth Circuit Court of Appeals reversed the judgment of the district court, based upon its incorrect perception that this case is solely a "preindictment delay" case and that petitioners did not meet the Sixth Circuit criteria applicable to such cases.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT PETITIONERS WERE DENIED DUE PROCESS BECAUSE OF THE GOVERNMENT'S DESTRUCTION OF CONSTITUTIONALLY MATERIAL EVIDENCE NECESSARY FOR PETITIONER'S DEFENSE

The district court's dismissal of the indictment against petitioners was based upon the preservation of evidence doctrine, as enunciated by the Supreme Court in *California v. Trombetta*, 467 U.S. 479 (1984), and related decisions. The final paragraph of the district court's order reads in full as follows:

> Because of the Government's negligence in failing to protect the documents and the resulting prejudice to the defendants' ability to put on an adequate defense,

it is the judgment of this Court that the Due Process Clause of the First Amendment bars the prosecution of these defendants. Therefore, the Court hereby DISMISSES the indictments against all defendants.

A. *The Preservation of Evidence Doctrine*

The duty imposed upon the prosecution to preserve potentially exculpatory evidence was identified and discussed in the case of *Killian v. United States*, 368 U.S. 231 (1961). In *Killian*, the petitioner had been convicted of giving false testimony in violation of 18 U.S.C. §1001. A key element of the government's case was an investigatory report prepared by FBI agents. The agents who prepared the report destroyed their preliminary notes from which the final report was made. The petitioner alleged that such notes would have been helpful to his defense and that his due process rights had been violated by the destruction of this potentially exculpatory evidence. Under the facts of *Killian*, the Court determined that the destruction of the agents' notes did not rise to the level of a violation of constitutional rights, because the notes themselves were "made only for the purpose of transferring the data thereon. Having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practices." *Id.* at 242.

Ten years later, Judge Skelly Wright delivered the opinion in *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). In *Bryant*, the court reviewed the "dark no-man's land of unreviewed bureaucratic and discretionary decision making" involved in preparation of the government's case against a defendant. The issue presented by the case was whether "intentional non-preservation by investigators—as opposed to bad faith destruction or prosecutorial withholding—of discoverable evidence amounts to its illegal suppression." *Id.* at 644. In the *Bryant* case, an undercover agent of the Bureau of Narcotics and Dangerous Drugs tape-recorded certain conversations that became the basis of the government's prosecution of the defendant. Subse-

quent to the operative events, the agent prepared notes of his recollection as to the events, but failed to transcribe the tape recording. Subsequently, prior to the date of the trial, the tape recording was inexplicably lost.

The court in *Bryant* reviewed the efforts made to safeguard the tape, and found that the government had made no effort to preserve it. *Id.* at 646. Thus, the case was not one of a good faith effort to preserve relevant evidence, frustrated by inadvertent loss. Instead, it was a case of "intentional non-preservation by an investigative official," as is the case herein as shown by the June 11, 1981 DOE directive.

In analyzing the appropriate consequences for the government's loss of the tape, the *Bryant* court considered the precedent of *Brady v. Maryland*, 373 U.S. 83 (1963). Pursuant to *Brady*, to Rule 16 of the Federal Rules of Criminal Procedure, and to the Jencks Act, 18 U.S.C. §3500 (1970), the court found that the threshold issue in cases dealing with access to government evidence is whether the particular material is covered by constitutional and statutory safeguards. Concluding that the evidence sought in *Bryant* was so covered, the court found that the issue usually turns upon the extent to which the evidence is "favorable" to the accused.

In attempting to define this standard, as the precedent existed in 1971, the *Bryant* court found that due process protection applies to all evidence which would lead a jury to entertain a reasonable doubt about a defendant's guilt, with the test to be applied "generously" to the accused when there is room for doubt as to what effect disclosure might have had. 439 F.2d at 648. Of course, in a destruction of evidence case, as opposed to a suppression of evidence case, it is not possible to be precise concerning the exculpatory nature of the destroyed evidence. As Judge Wright noted, in such a case "[t]here is not simply 'substantial room for doubt,' but room for nothing except doubt as to the effect

of disclosure." *Id.* at 648. Nor did the court in *Bryant* find it significant that the Bureau of Narcotics and Dangerous Drugs, and not the U.S. Attorney's Office, misplaced the tape. The court stated broadly that "the duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." Such a finding is also required by Rule 16 and the Jencks Act, which refer, respectively, to evidence gathered by the "government" and "the United States."

Based upon all of the foregoing considerations, the *Bryant* court remanded the case for further proceedings consistent with its opinion, but found that without the appropriate tapes, a new trial would be no improvement on the first trial, and a trial which suppressed the agent's recollections of the testimony would be pointless. Thus, although the court remanded the case, it indicated that the only logical judicial response would be dismissal of the indictment. *Id.* at 653.

Subsequent to the decision in *Bryant,* a number of commentators analyzed and considered the government's duty with regard to preservation of evidence. *See, e.g.,* Note, *The Right to Independent Testing: A New Hitch In The Preservation Of Evidence Doctrine,* 75 COLUM. L. REV. 1355 (1975); Note, *Criminal Procedure: Government Has Duty to Implement Effective Guidelines to Preserve Discoverable Evidence,* 1971 DUKE L.J. 644; Comment, *Judicial Response to Governmental Loss or Destruction of Evidence,* 39 U. CHI. L. REV. 542 (1972). Uniformly, all of these commentators agree that the prosecution is under a constitutional duty to preserve any evidence that is material and/or discoverable.

As noted by courts and commentators alike, the issue of materiality is a difficult one to resolve in destruction of evidence cases, precisely because the evidence has been permanently destroyed. Nevertheless, materiality remains the

touchstone of the analysis, despite the fact that such an analysis is problematic:

> Destruction of evidence relevant to the defense in criminal cases raises significant questions in itself. The issue becomes even more troublesome, however, where that destruction occurs after the State has had opportunity to test [or review] that evidence, but before the defense has been allowed a similar opportunity of evaluation. Without more, the systematic practice of such destruction puts the defendant at a serious disadvantage, since the opportunity to challenge state . . . findings will often be largely foreclosed. Several courts have held that a policy of such destruction violates due process of law [cit. omitted] and the affirmative duty of preservation for independent testing and evaluation has been recognized as an extension of the fundamental state obligation to disclose all material evidence.

Note, *The Right to Independent Testing*, 75 Colum. L. Rev. at 1379.

The Court both recognized and reduced the uncertainty in this area in the case of *California v. Trombetta*. In *Trombetta*, the Court analyzed the defendant's constitutionally protected privilege to request and obtain from the prosecution evidence material to the guilt or innocence of the accused. The Court noted that it had "never squarely addressed the Government's duty to take affirmative steps to preserve evidence on behalf of criminal defendants." 467 U.S. at 486. Part of the problem, as acknowledged by the Court, is that "whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents is unknown and, very often, disputed." *Id.*

After reviewing the holding of *Killian*, the Court turned to the facts of the *Trombetta* case. *Trombetta* involved the destruction of breath samples used in connection

with the prosecution of a drunk driving charge, which destruction was agreed to be in good faith and in accord with normal practices. Moreover, the breath samples which had been destroyed by the State of California had been tested by a machine, the accuracy of which was reviewed and certified by the California Department of Health on a regular basis. Finally, to protect against machine malfunction, California developed test procedures which included two independent measurements and periodic calibration. Based upon these indicia of accuracy, the Court found no constitutional violation in California's failure to preserve the breath samples themselves.

In analyzing the *Trombetta* case, however, the Court noted that the standard of constitutional materiality determines the limitations of constitutional protection of evidence. Citing *United States v. Agurs*, 427 U.S. 97 (1976), the Court defined the standard as follows: "[E]vidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489. Accordingly, the issues for decision in this matter are clear: did the district court correctly decide that the evidence destroyed with the government's consent possessed an exculpatory value; was that value apparent before destruction; and are petitioners unable to obtain comparable evidence by other means?

B. *Application Of The Preservation Of Evidence Doctrine To The Facts Of This Case*

1. Nature of the Documents Destroyed

Petitioners placed in the record below all of the documents obtained from TEA by petitioners' subpoena. As noted in the government's brief on appeal to the Sixth Cir-

cuit, at footnotes 3 and 9 (Appendix at 24, 39), these documents included some explanatory materials that were created *after* the time period during which petitioners submitted their set-aside applications. Noticeably absent from TEA's files were all primary documents, such as Hollingsworth Oil's original applications, the attachments to those applications, and any caseworker notes which might have been appended thereto or located in TEA files. Moreover, despite the government's assertion that certain interpretative bulletins exist, it is unknown whether prior interpretative bulletins were created that might have been at variance to those which were found in TEA's files and which were created subsequent to Hollingsworth Oil's applications. TEA likely issued memoranda directed to caseworkers, broadly defining the terms "hardship" or "emergency," and affirming TEA's total discretion in applying such terms. Indeed, no one will ever know the exact contents of TEA's files, as the TEA set-aside program was administered by part-time employees and was overseen by individuals whose names have long been forgotten. As noted by the district court, the original applications and their attachments would have been significant not only for the information they contained about Hollingsworth Oil's application process, but also for any light that might have been provided as to the identities of the caseworkers who processed the applications, from whom important testimony would have been obtained.

The government argues that the interpretations given to regulations by individual agency employees are entitled to "little weight." Government's brief on appeal at page 18, note 8 (Appendix at 34-35). This proposition may be accurate in general, but under the specific circumstances of this case, where almost complete discretion existed, such interpretations could well have created the reasonable doubt sufficient to exonerate petitioners. In the cases cited by the government at pages 22 and 23 of its brief on appeal (Ap-

pendix at 38-39), the evidence which was found to carry minimal impact concerned interpretative analyses by government agency employees. Petitioners argue, on the other hand, that regardless of whether the TEA employees' interpretations were correct in this case, they served as a basis for petitioners' reliance upon and acquiesence to a certain procedural approach. Inasmuch as there was no federal definition of "hardship" or "emergency," and no state definition of these terms until after the fact, only the individual caseworkers provided guidance to Hollingsworth Oil. To the extent that Hollingsworth Oil made full disclosure of all factual circumstances to such caseworkers, any reliance upon the caseworkers' discretionary directives would of course constitute a complete defense to this prosecution. *United States v. Cox*, 348 F.2d 294, 296 (6th Cir. 1965).

The government itself concedes that the TEA caseworkers virtually controlled the application process. The government noted, on page 4 of its brief on appeal (Appendix at 22), that the TEA caseworker was required to consider the amount of gasoline in the set-aside program, evaluate the number of applications for such gasoline, evaluate the applicant's specific request, consider the amount of historical demand, review the daily consumption, storage capacity and allocation status of the applicant under federal regulations, and to otherwise "[screen] the application for completeness and accuracy." *Id.* at 4-5. Clearly, the TEA caseworker was vested with a great deal of discretion, and it is equally clear that the caseworker was under a duty to reject the application if it was not in compliance with state law. If the TEA original files had not been destroyed, it would be possible to review the Hollingsworth Oil applications to determine what instructions were given on a case-by-case basis, what information was provided in each instance, and the exact nature of the reliance which Hollingsworth Oil placed on the TEA employees to assist it in submitting applications. Unfortunately, this evidence is

now lost forever, due entirely to the government's failure to preserve the evidence in a reasonable manner.

2. Materiality versus "Exculpatory Value"

As noted previously, the *Bryant* case considered the sanction to be imposed for destruction of evidence as a function of the materiality of the evidence destroyed. In that case, Judge Wright noted that any "favorable" evidence must be preserved. The *Bryant* court went on to note that the test of what evidence should be retained should be applied generously to the accused when there is room for doubt as to the effect disclosure might have had. Citing an earlier case, the court explained why such a lenient approach is necessary:

> This standard [the ultimate possibility of harm to the defendant] requires speculation because there is no sure way to know how the jury would have viewed any particular piece of evidence. Nor is it possible to know whether revelation of the evidence would have changed the configuration of the trial: whether defense counsel's preparation would have been different had he known about the evidence, whether new defenses would have been added, whether the emphasis of the old defenses would have shifted. Because the standard requires this kind of speculation we cannot apply it harshly or dogmatically.

439 F.2d at 648, n. 9, *quoting Levin v. Clark*, 408 F.2d 1209, 1212 (1967).

The *Trombetta* case added a new requirement, as suggested by the *Bryant* decision, that the exculpatory value must be apparent before the evidence was destroyed. Moreover, the evidence must be of the type that might be expected to play a "significant role" in the suspect's defense. *California v. Trombetta*, 467 U.S. 479 (1984).

3. The District Court's Decision

In the case at bar, the district court specifically found that a substantial portion of petitioner's defense would be based on the position that the prosecution is barred by the vagueness of the state laws involved and that the defendants were never on notice as to what acts were unlawful. Dist. Ct. Op. at 6-7 (Appendix at 9). The court went on to note that since all of the primary documents of the TEA were destroyed prior to the indictment, it is "extremely difficult, if not impossible, for the defendants to put on documentary proof or to locate witnesses." *Id.* at 7. The court also found that the documents in question were definitely constitutionally material, that they had exculpatory value that was apparent to the government, and that they were of such a nature that the defendants would be unable to obtain comparable evidence by any other means. These latter findings are findings of fact, which should have been upheld by the appellate court to the extent that they were supported by any evidence.

It is obvious that the government was aware of the existence of the primary documents in this case, that it took no steps to preserve and protect those documents, that in fact it specifically authorized the destruction of those documents, and that it admitted all of the above facts and circumstances not only in pleadings filed with the district court but in its brief on appeal. Given the admitted discretionary function of the TEA caseworkers, the original TEA documents were unquestionably material to the issue of guilt or innocence, and most likely were exculpatory. Nor can it be seriously argued that the exculpatory nature of such documents was not apparent. Finally, there exist no alternative means of proof concerning vagueness, acquiescence, or reliance, defenses which would otherwise be available to defendants. Under the principles expressed in *Trombetta, Killian,* and *Bryant,* the district court was

clearly correct in dismissing the indictment, irrespective of the preindictment delay issues.

The Sixth Circuit Court of Appeals, on page four of its opinion, gave only cursory consideration to *Trombetta*, stating only that nothing in the *Trombetta* opinion supported the district court's dismissal of the indictment against petitioners. The court of appeals failed to consider the gravity of the impact of the document destruction on petitioners' due process rights, and did not give adequate consideration to the Court's position as stated in *Trombetta*. Thus, the Sixth Circuit Court of Appeals has decided an important question of federal law in a way which conflicts with applicable decisions of this Court.

II. THE DISTRICT COURT PROPERLY FOUND THAT PETITIONERS SUFFERED ACTUAL PREJUDICE RESULTING FROM THE GOVERNMENT'S NEGLIGENT DESTRUCTION OF EXCULPATORY DOCUMENTS, WHICH PREJUDICE, COUPLED WITH PREINDICTMENT DELAY, WARRANTED DISMISSAL OF THE INDICTMENT

A. *The Sixth Circuit's Decision Is In Conflict With Applicable Decisions Of This Court*

The Sixth Circuit Court of Appeals interpreted the district court's consideration of the preservation of evidence doctrine as a means of demonstrating the prejudice suffered by the petitioners as a result of preindictment delay rather than as an independent basis for dismissal. In reality, the district court's order of dismissal was firmly based on both doctrines. The government's intentional destruction of evidence occurred during and was made possible by the extraordinary delay suffered by the defendants.

In *United States v. Marion*, 404 U.S. 307, 324 (1971), the Court recognized that actual prejudice stemming from preindictment delay may result in deprivation of due process to an accused. The Sixth Circuit Court of Appeals, in this case and in other cases interpreting *Marion*, misapplies the relevant constitutional principles set forth by this Court. The phrase drawn from *Marion* which supposedly establishes a two-step test for dismissal of an indictment states that dismissal is required "if it were shown at trial that the pre-indictment delay *in this case* caused substantial prejudice to appellees' right to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused." 404 U.S. at 324 (emphasis supplied). Read alone, this language would seem to establish two criteria that must be met to support dismissal of an indictment. Indeed, controversy has arisen whether to construe the word "and" in a disjunctive or conjunctive manner. *See, e.g., U.S. v. Mays*, 549 F.2d 670 (9th Cir. 1977).

However, a close reading of the Court's entire statement, as the district court found, provides a different interpretation: that the statement was a restatement of a government concession. The entire sentence reads as follows:

> Thus, *the Government concedes* that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

Marion, 404 U.S. at 324 (emphasis supplied). The Court in *Marion* was considering only what the government *conceded* were circumstances justifying dismissal. It was not constructing an absolute, all-inclusive test, the criteria of which must be satisfied to require dismissal of an indictment.

This Court did not deign to suggest any hard and fast rule to be applied in every case. Indeed, this Court stated that "[w]e need not, and could not now, determine when and in what circumstances actual pre-accusation delay requires dismissal of the prosecution." *Id.* at 324-25. Additionally, the Court noted that:

> To accommodate the sound administration of justice to the rights of the defendant to a fair trial will *necessarily involve a delicate judgment based upon the circumstances in each case.* It would be unwise at this juncture to forecast our decisions in such cases.

Id. at 325 (emphasis supplied). Given the difficulty of proving intent on the part of the government, it is unlikely that the Court would consider a rigorous threshold criterion of proof of bad intent by the government as being part of this "delicate judgment." Rather, intent should be but one factor considered in the balance. Thus, the test should not be a two-step analysis, but rather a balancing of the actual prejudice to the accused with the government's justification, if any. *No* justification has been shown by the government in this case.

This approach to construing *Marion* is supported by the Court's holding in *U.S. v. Lovasco,* 431 U.S. 783 (1977), wherein the Court stated that, in *Marion,* it "could not determine in the abstract the circumstances in which pre-accusation delay would require dismissing prosecutions." *Id.* at 796. The Court further stated that the "lower courts, in the first instance, [have] the task of applying the settled principles of *due process . . . to the particular circumstances of individual cases.*" *Id.* at 797 (emphasis supplied).

Therefore, the Court's holdings in *Marion* and *Lovasco* require not a burdensome two-step test, but a careful weighing of the factors involved in each case, especially the actual prejudice suffered by the accused. The focus should

be on the prejudicial effect to the accused, not on the necessity for bad "intent" in the conduct of the government, so as to give proper consideration to the due process rights of the accused. In addition, the focus should be upon the justification for and support of the district court's decision. The Sixth Court's decision in this case and in others interpreting *Marion*[1] are in conflict with applicable decisions of this Court, and are a misapplication of the most basic constitutional principles. Consequently, the decision of the Sixth Circuit Court of Appeals should be reversed, since its decision improperly curtails petitioners' constitutional rights.

B. *The Sixth Circuit's Decision Is In Conflict With Other Federal Courts of Appeals On The Same Matter*

The "balancing test" analysis, employed on a case-by-case basis, has been adopted by other circuits considering issues similar to those in this case. In a well-reasoned decision, the Ninth Circuit Court of Appeals in *United States v. Mays*, 549 F.2d 620 (9th Cir. 1977), discussed the burden that a defendant must meet in order to establish a denial of due process from preindictment delay. That court of appeals noted the confusion among the various circuits regarding the conjunctive versus disjunctive analysis. Focusing instead on the balancing of the factors present in the individual factual situation, as required by *Marion* and *Lovasco*, the Ninth Circuit rejected both absolute approaches. 549 F.2d at 677. This approach necessarily incorporates a review of the effect of delay upon a criminal defendant's ability to put on his defense.

The district court properly found that petitioners established that they have suffered actual prejudice resulting from the delay of the government in seeking this indict-

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1. *See U.S. v. Duncan*, 736 F.2d 220 (6th Cir. 1985); *U.S. v. Greene*, 737 F.2d 572 (6th Cir. 1984).

ment. Even without a showing of intentional prosecutorial misconduct, a showing of actual prejudice may establish a deprivation of Fifth Amendment due process. *United States v. Giacalone*, 477 F.2d 1273, 1276 (6th Cir. 1973); *accord, United States v. Gouveia*, 467 U.S. 180 (1984). This prejudice may consist of the loss of principle evidence or its use. *See United States v. Lovasco*, 481 U.S. at 790; *United States v. Mays*, 549 F.2d at 677; *United States v. Griffin*, 464 F.2d 1352, 1354-56 (9th Cir. 1972), *cert. denied*, 409 U.S. 1009 (1973). The district court found that petitioners met their burden of showing the destruction of the evidence and that the resulting loss was prejudicial to their defense. Dist. Ct. Op., at 7 (Appendix at 9); *see also United States v. Marion*, 404 U.S. at 326; *United States v. Mays*, 549 F.2d at 677.

The government does not dispute that the original evidence has been destroyed. The destroyed set-aside applications, as mentioned previously, contained marginal notes and other information upon which individual caseworkers determined whether petitioners "qualified" for set-aside assistance. The district court considered whether petitioners suffered actual prejudice due to the destruction of such documents, and concluded, after oral argument and after observing the "copies" of the documents proffered by the government, that petitioners' defense rested upon the documents destroyed at government direction. As the basis for the indictment, the district court found that these individual applications, attachments and instructions, as well as the identities of the caseworkers, are essential to the defense of petitioners.

Courts have traditionally granted the government some leeway in seeking indictments. *United States v. Mays*, 549 F.2d at 678. Where, as here, a defendant shows actual prejudice due to government-caused preindictment delay, the burden of proof shifts to the government to show the reasons for the delay. In such analysis, the court will con-

sider the extent of the delay, the reasons put forth in explanation of such delay, and all attendant circumstances. Generally, the government bears full responsibility for all aspects of the case's progress. The ultimate responsibility for delay, therefore, must rest with the government, rather than the defendant. *Id.*; *United States v. Barket*, 530 F.2d 189, 195 (8th Cir. 1976). Although courts usually require some showing of culpability on the government's part, either in the form of intentional misconduct or negligence, the impact of the delay is also considered. The greater the length of the delay and the more substantial the actual prejudice to the criminal defendant, the greater the burden of the government. *United States v. Mays*, 549 F.2d at 678.

In *United States v. Moran*, 759 F.2d 777 (9th Cir. 1985), the Ninth Circuit was faced with the task of interpreting *Mays* in light of the holdings in *Marion* and *Lovasco*. The Ninth Circuit flatly rejected the test argued by the government here, and found that intentional or reckless behavior is not an essential ingredient in determining whether a preindictment delay has violated due process. According to the Ninth Circuit, *Marion* and *Lovasco* require a balancing test, and do not require an all-or-nothing approach. *Id.* at 782. Therefore, the Ninth Circuit has affirmed a finding that negligent governmental conduct, coupled with prejudice to the defendant, may constitute a denial of due process. *Id.*

A similar result was reached by the Fifth Circuit in *United States v. Townley*, 665 F.2d 579 (5th Cir. 1982). In that case, the government asserted, as it does here, that even if the defendant was actually prejudiced, that defendant could not prevail unless he could show that the delay was intentional. *Id.* at 582. The Fifth Circuit found that *Marion* and *Lovasco* do not support the proposition that a defendant must show governmental conduct amounting to an intentional tactical delay. *Id., citing United States v. Brand*, 556 F.2d 1312, 1317, n. 7 (5th Cir. 1977). As stated

by the Fifth Circuit, "[T]he *Lovasco* balancing test would be reduced to mere words if indeed the government's . . . delay in bringing the indictment were excusable, whatever the prejudice caused the defendant, simply by showing that the government was negligent, however grossly, and not bad-intentioned." *United States v. Townley*, 665 F.2d at 582.

The Second Circuit has also given implicit approval to this same analysis when considering destroyed evidence in a preindictment delay context. *United States v. Birney*, 686 F.2d 102 (2d Cir. 1982), involved a bank teller who, because of an audit, was investigated by the F.B.I. for alleged embezzlement. Thereafter, the defendant moved to dismiss the indictment because of the prejudice suffered during the three year preindictment delay. The defendant contended that records lost or destroyed during the preindictment period were necessary to enable her to defend herself against the charges. The district court found that the defendant had suffered substantial prejudice to her ability to defend herself because of the negligence on the part of the government in failing to retrieve and safeguard documentary evidence. The district court, therefore, dismissed the embezzlement count and the Second Circuit did not disturb that ruling. *Id.* at 105.

In *Birney*, unlike the instant case, the records were never in the possession of the federal government; the policies of the bank and its officers resulted in various documents being destroyed or lost. Here, the documents that were pertinent to this case were at all times in the possession or control of the government. Thus, the circumstances in this case present an even stronger argument for reversal of the decision of the Sixth Circuit.

Clearly, other federal courts of appeals in similar cases have adopted a balancing test, not the burdensome two-step test adopted by the Sixth Circuit. The decision of the Sixth Circuit in this case is clearly in conflict with decisions

in the Ninth, Fifth, and Second Circuits on the same matter, and calls for a clear indication by this Court that the district court was correct in dismissing the indictment.

CONCLUSION

The decision of the Sixth Circuit reversing the district court's dismissal of the indictment against petitioners was in error, and misinterprets the most basic constitutional principles enunciated by this Court in *Trombetta, Marion* and *Lovasco.* Furthermore, the Sixth Circuit's decision stands squarely in conflict with a line of cases on the same issue from three other circuits.

For these reasons, we respectfully request that this Court grant the Petition for Writ of Certiorari, to resolve the conflict among the circuit courts of appeals, and to clarify the constitutional principles misinterpreted by the Sixth Circuit, as set forth by this Court in *Trombetta, Marion,* and *Lovasco.*

Respectfully submitted this 30th day of May, 1986.

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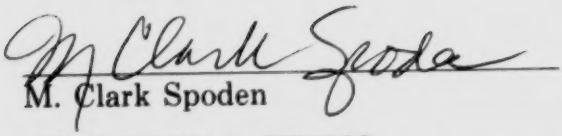

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